89-515

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROCHESTER, NEW HAMPSHIRE, SCHOOL DISTRICT,
Petitioner,

v.

TIMOTHY W., BY AND THROUGH HIS
MOTHER AND NEXT FRIEND, CYNTHIA W.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Education for All Handicapped Children Act, 20 U.S.C. § 1400 *et seq.*, requires participating States and local school districts to provide educational services to children whose mental incapacity renders them unable to benefit from such services.

2. Whether a State's obligations under the Education for All Handicapped Children Act may be significantly expanded by transforming "related services"—such as physical and occupational therapy—into educational services, which are entitled to far broader statutory coverage.

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The Rochester, New Hampshire, School District seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 875 F.2d 954, and is reprinted in the appendix to this petition ("Pet. App.") at 1a. The opinion of the United States District Court for the District of New Hampshire is reported at 1987-88 Education for Handicapped Law Reporter ("EHLR") 559:480 (1988), and is reprinted at Pet. App. 40a. The opinion of the New Hampshire Department of Education

Hearing Officer is reported at 1987-88 EHLR 509:141 (1987), and is reprinted at Pet. App. 60a.

JURISDICTION

The court of appeals entered judgment on May 24, 1989, and denied petitioner's motion for rehearing and suggestion for rehearing *en banc* on June 30, 1989. These orders are set forth at Pet. App. 64a and 65a respectively. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions involved in this case are the Education for All Handicapped Children Act, 20 U.S.C. § 1400 *et seq.*, and the New Hampshire Special Education Act, N.H. Rev. Stat. Ann. § 186-C. They are set forth at Pet. App. 67a and 182a respectively.

STATEMENT

This case involves a thirteen year old child who is so mentally disabled that he is incapable of learning even the most rudimentary skill. Respondent Timothy W. was born two months prematurely and weighed four pounds. Immediately after birth, he began to suffer from severe respiratory and brain disorders, necessitating long-term hospitalization. These problems caused extreme brain damage, leaving Timothy with "virtually no cortical tissue." App. II, 188.[1] Consequently, Timothy has consist-

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[1] "App." cites are to the appendix filed in the court of appeals. The quotation in text is from a report of an X-ray taken when Timothy was six months old. The report goes on to explain that "[c]ortical tissue is brain tissue of the cerebral hemisphere; that is, tissue above the brain stem and spinal cord. . . . [The] brain stem regulates reflex activity, both motor as well as vegetative functions, including breathing and cardiac regulation. . . . The cortical hemispheres basically are responsible for all the learned skills that develop after the newborn period." App. II, 188.

ently exhibited profound mental and developmental retardation, deafness and blindness, a persistent convulsive disorder and severe cerebral palsy. He is virtually immobile, suffers from spasticity and has contracted joints, dislocated hips and scoliosis.

From the time he was a year old, Timothy received extensive governmental services, including physical and occupational therapy and sensory stimulation. Until he was four and a half, he attended a day program for severely and profoundly retarded children at the Rochester Child Development Center. Despite these early efforts, however, Timothy's doctors concluded that he "has no potential for development of self-care functions and has no educational potential." App. IV, 762. "All but the bottom of [his] brain ha[s] been destroyed by hydrocephalus. Timmy functions as a reflex individual." App. IV, 784. Based on these professional opinions, when petitioner evaluated Timothy in early 1980, it concluded that he had no learning capacity and that he was therefore ineligible for educational services under the Education for All Handicapped Children Act ("EAHCA"), 20 U.S.C. § 1400 *et seq.*, a federal-state program in which New Hampshire participates.

In the following years, Timothy continued to receive a variety of services, including medical care, physical therapy, tactile stimulation and eating therapy, pursuant to the provisions of the Disabled Children's Program of the Social Security Act, 42 U.S.C. § 1382 *et seq.* Still he made no progress, continuing to demonstrate virtually "no volitional movement." App. IV, 812. Nevertheless, in 1983, Timothy's mother, assisted by counsel, renewed her efforts to get special education services for her son. Petitioner responded by requesting that Timothy submit to a comprehensive evaluation to determine whether his condition had improved since his last evaluation in 1980. When his mother refused, petitioner again concluded that Timothy was ineligible for educational services under the

EAHCA because, on the basis of the available information, he was determined to be incapable of benefiting from educational services.

Timothy filed the instant lawsuit on November 17, 1984, seeking injunctive relief and $175,000 in damages. After denying a motion for a preliminary injunction,[2] the district court decided to abstain pending exhaustion of Timothy's administrative remedies under the EAHCA. During the next several years, Timothy received a large number of diagnostic tests and educational assessments, which confirmed that he is incapable of any meaningful learning. A specialist in pediatric neurology, for example, determined that Timothy suffered "extreme brain atrophy," with constant seizures on one side of his brain and little or no activity on the other side. She concluded that "the potential for learning with such a degree of central nervous system damage is practically nonexistent." App. II, 192-96; App. IV, 900, 1028-31, 1053. A report by an occupational therapist similarly stated that "[n]o cortical reflexes or reactions could be elicited." App. III, 520-21. In addition, Timothy was also receiving extensive educational services at this time, but evidenced no capacity to respond to these efforts. *See* pp. 5-6 *infra*.[3]

On October 14, 1987, the state administrative hearing officer ruled that Timothy qualified for educational serv-

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[2] The court premised this ruling on the fact that Timothy had received a substantial settlement in a malpractice action and thus would not be irreparably harmed absent an injunction since he could afford to purchase the services in question and seek reimbursement thereafter.

[3] The New Hampshire Department of Education, acting on a complaint filed by Timothy in 1984, had ordered petitioner to conduct an evaluation and, as part of the process, to provide Timothy with interim educational services designed to assess his need for special education. App. IV, 874. Petitioner has provided an educational program since 1985 that significantly exceeded the requirements set out by the Department.

ices under the EAHCA and its state counterpart, N.H. Rev. Stat. Ann. § 186-C (Supp. 1988). Despite the voluminous factual record before him, the hearing officer rested his decision on a legal ground, concluding that all handicapped children, regardless of whether they are "capable of benefiting from special education," must be provided with such services. Pet. App. 60a. Petitioner appealed this decision by filing a counterclaim in the instant action.

On July 15, 1988, after conducting a two day trial limited to the issue of Timothy's ability to benefit from educational services, the district court granted summary judgment for petitioner. First, it held that the EAHCA does not require States to provide an education to a child who cannot benefit from it. Relying on the rationale of this Court's decision in *Board of Educ. v. Rowley*, 458 U.S. 176 (1982), the court concluded that "Congress would not legislate futility!" Pet. App. 47a.[4] Turning next to the question of plaintiff's eligibility, the district court reviewed the factual record in detail. In addition to considering the detailed medical and educational information going back to Timothy's birth, and viewing a videotape of his activities, the court also heard the testimony of several experts who were directly involved in his care. For example, the Executive Director of the Stafford Center where Timothy had then been receiving full-time educational services for fifteen months testified that, based on careful observation and data analysis, it was her conclusion that he had made no progress and continued to perform at a reflex level. App. II, 245-62. Similarly, Timothy's program supervisor at the Center, while

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[4] The district court also held that N.H. Rev. Stat. Ann. § 186-C was intended to implement the State's participation in the EAHCA and that, therefore, it did not call for services beyond those required by federal law. Pet. App. 49a-51a. The court of appeals later agreed with this interpretation of state law, but reached a different conclusion as to its substance since it had taken a contrary view of the scope of the EAHCA. Pet. App. 39a.

stating her belief that all children are educable, nevertheless testified that Timothy had made no progress even on the most fundamental skills: *e.g.*, reaching five centimeters for a toy or turning his head leftward in a darkened room toward a large light box. In fact, during his fifteen months at the Center, Timothy had evidenced volitional movements only twice, by lifting his arm toward a music box. App. II, 329-401. Based on this record, the district court came "to the regrettable conclusion that Timothy W. is not capable of benefiting from special education." Pet. App. 57a.[5]

The Court of Appeals for the First Circuit reversed, holding that the district court had misconstrued the scope of the EAHCA. It placed primary reliance on the fact that the EAHCA "is permeated with the words '*all* handicapped children' whenever it refers to the target population." Pet. App. 12a (emphasis in original). The court also stressed that the statute contains a priority for "*children . . . with the most severe handicaps.*" Pet. App. 11a (emphasis in original) (quoting 20 U.S.C. § 1412 (3)). These provisions, according to the First Circuit, demonstrate that the "plain language" of the Act "mandates an appropriate public education for all handicapped children, regardless of the level of achievement that such children might attain." Pet. App. 12a.[6] The court of appeals also went on to rule that the concept of "education for the severely handicapped under the Act is to be broadly defined," indicating that services like "occupa-

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[5] The court further held that its ruling does not "obviate an opportunity to [receive] such education indefinitely. This child must be subject to continuous, but periodic evaluations, intended to identify any development which illustrates a capability to benefit from special education." Pet. App. 57a-58a.

[6] The court found additional support for this view in the EAHCA's legislative history and in several judicial opinions that had mentioned the issue in *dicta*.

tional and physical therapy are to be considered educational services." Pet. App. 33a, 34a.[7]

REASONS FOR GRANTING THE WRIT

The court of appeals has incorrectly decided an important question of national law affecting the delicate area of federal-state relations. Its decision threatens to divert scarce governmental resources—financial and human—away from children who are able to benefit from educational services in order to have them expended on children who, unfortunately, are incapable of being helped by such services. In reaching its conclusion, moreover, the court stretched the definition of "education" beyond recognition by including services such as physical and occupational therapy. This aspect of its ruling is likely to have important consequences that go well beyond the circumstances of the instant case because it will require

[7] In view of these legal conclusions, the court purported not to rule on Timothy's challenge to the district court's factual finding that he was uneducable. Its opinion, however, presents the evidence in a completely contrary manner by misstating the record, citing to any inference that might suggest that Timothy was educable, and explaining away or ignoring expert opinions that disagreed with such a view. For example, the court attempts to discredit the testimony of Dr. Andrews—upon whom the district court had placed heavy reliance—by stating that "[h]er only contact with Timothy had been during an evaluation when he was two months old," Pet. App. 5a, when, in fact, Dr. Andrews testified that she had been involved in Timothy's care for years and had seen him three times in the fourteen months prior to trial. App. II, 180-83. Similarly, the court refers to the testimony of another doctor who had "recommended the establishment of an educational program for Timothy which emphasized physical therapy and stimulation," Pet. App. 2a, but fails to mention the same doctor's repeated testimony that Timothy is incapable of benefiting from special education, even if that concept is broadly defined to include basic self-care skills, App. IV, 763, 783-84, 787. Because this kind of distorted factual presentation was so pervasive, we think that the court below violated the spirit, if not the letter, of this Court's ruling in *Anderson v. Bessemer City, N.C.*, 470 U.S. 564 (1985) (factual findings cannot be reversed unless clearly erroneous).

local school districts to pay for a new range of costly services for numerous handicapped children who are covered by the EAHCA. In view of its significance, the case merits review by this Court.

1. The primary issue presented by this case is both important and recurring. The EAHCA is one of the major federal-state-local government service programs in this country, with all fifty States currently participating. Enacted in 1975, the statute sets out substantive and procedural rules governing the provision of special educational services to handicapped children, and provides federal financial assistance to participating States. The overwhelming proportion of the money required to carry out the statute's mandates, however, is paid by state governments and local school districts. *See, e.g.*, Pittenger & Kuriloff, *Educating the Handicapped: Reforming a Radical Law*, 66 The Public Interest 72, 86-89 (Winter 1981) (federal government pays about six percent of average per pupil cost under the EAHCA).

With the costs of special education rising substantially, one of the pressing concerns of local school districts has been whether they must continue to provide educational services even when it becomes painfully obvious that a particular child is incapable of benefiting from them. This issue has arisen with increasing frequency in recent years, as school districts have come to realize, through repeated failed attempts, that certain children are uneducable. There have been at least ten cases before administrative hearing officers dealing with the issue, most of which have held that if a child is incapable of benefiting from educational services he or she is not covered by the EAHCA.[8] And, although the numbers are some-

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[8] For the majority view, *see Christopher C. v. Weston Pub. Schools*, 1987-88 EHLR 509:154 (Mass. 1987); Case No. SE-53-81, 1984-85 EHLR 506:239 (Ill. 1984); Case No. 10571, 3 EHLR 502:315 (N.Y. 1981); *Nashua School Dist. v. James O'C.* (N.H. 1986) (App. VII, 1472); *X. v. Laconia School Dist.* (N.H. 1981)

what speculative, it would appear that there are several thousand children in this country who are so lacking in physical brain capacity that they are unable to learn even the most basic self-care skills. *See generally* Rothstein, *Educational Rights of Severely and Profoundly Handicapped Children*, 61 Neb. L. Rev. 586, 608-12 (1982) (citing authorities concerning non-educability).[9] Pursuant to the holding of the court below, these children must receive educational and related services under the EAHCA from the time they are three until they reach their twenty-first birthday. 20 U.S.C. § 1412(2)(B).

The services in question typically are very expensive. Children who are uneducable are obviously extremely difficult to work with and require constant care and attention. In the instant case, for example, the "educational" program for Timothy currently costs approximately $15,000 per year, App. IV, 1066-67, which is about five times the average per pupil cost of educating non-handicapped children in New Hampshire. The federal government contributes less than $300 to this $15,000 expense. App. I, 132. The remainder must be paid out of state and local education budgets, which are already strained to, if not beyond, the breaking point. These dollars, in other words, could profitably be spent on children who can benefit from education.[10]

(App. VII, 1473); *LeClerc v. Milan School Dist.* (N.H. 1981) (App. VII, 1480). In addition to the hearing officer in this case, three others have reached a contrary decision. *See Contra Costa County Consortium*, 1985-86 EHLR 507:300 (Cal. 1985); *School Dist. of the Menomonie Area v. Rachel W.*, 1983-84 EHLR 505:220 (Wisc. 1982); *In re Keith J.*, 3 EHLR 502:271 (Ga. 1981).

[9] According to expert testimony in this case, there are approximately fifteen children out of New Hampshire's one million citizens who appear to be incapable of functioning beyond a reflex level. App. II, 219. If the same ratio were to apply nationwide, the number of children in question would be between three and four thousand.

[10] In addition to the cost of educational services, school districts must also pay for "related services" under the EAHCA. 20 U.S.C.

There are also less tangible, but perhaps even more important, costs at issue in this case. By insisting that an education be provided to children who are uneducable, the court below places unrealistic demands on teachers and classrooms. Frustration and burnout are already enormous problems among teachers in general and special education teachers in particular. *See, e.g., Teacher Burnout* (A. Alschuler, ed., NEA 1980). These problems are made much worse by asking teachers to devote endless hours to children who are unable to show any sign of improvement. The court of appeals' decision likewise may have unfortunate consequences for families of uneducable children because it raises false hopes, which in turn often lead to bitterness and disillusionment.

Collectively, these various costs are sufficiently grave that, before the federal courts require that they be borne by state governments and local school districts, this Court should ensure that Congress unmistakably intended such a result.

2. The decision below is not only important, it is also wrong. Simply as a matter of common sense it seems inconceivable that Congress would insist that the States provide costly educational services to a child who "is afflicted by such extreme handicap(s) that the child is not capable of benefitting from special education." Pet. App. 49a. As the district court put it, "[s]urely, Con-

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§ 1401(a)(18). Although not the case for Timothy, typically for children who function at his level those services include the full cost of a residential placement. *See, e.g., Parks v. Pavkovic*, 753 F.2d 1397 (7th Cir.), *cert. denied*, 473 U.S. 906 (1985); *Abrahamson v. Hershman*, 701 F.2d 223 (1st Cir. 1983). *See also* 34 C.F.R. § 300.302. The cost of such residential services can readily be three or four times the cost of the educational services, often making the total cost between fifty and eighty thousand dollars for a single child. *See generally The Directory for Exceptional Children* (11th ed. 1987-88).

gress would not legislate futility!" A careful reading of the statute confirms this common-sense view.[11]

The court of appeals purported to rely on the "plain language" of the EAHCA, finding its repeated mandate—"*all* handicapped children [must] have available to them . . . a free appropriate public education"—to be virtually conclusive on the issue. Pet. App. 10a (emphasis in original) (quoting 20 U.S.C. § 1400(c)). *See also* 20 U.S.C. §§ 1400(b)(8), 1412(1), 1412(2)(A). There are two distinct reasons, however, why this language cannot properly be read to require an education for children who are incapable of learning.

To begin with, the term "handicapped children"—*i.e.*, those who are covered by the statute—is expressly limited to people "who by reason [of a specified disability] *require* special education and related services." 20 U.S.C. § 1401(a)(1) (emphasis supplied).[12] This definitional limitation is reflected throughout the statute, making clear that participating States must cover only those children "who are in *need* of special education." 20

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[11] The court of appeals mischaracterized petitioner's position as claiming the authority to "*unilaterally exclud*[*e*] certain handicapped children . . . on the ground that they are uneducable." Pet. App. 38a (emphasis supplied). But petitioner argued—and the district court held—only that a school board should have the opportunity to show that a particular individual cannot, in fact, benefit from educational services. That determination, of course, would be subject to the comprehensive administrative and judicial process that Congress has established under the EAHCA. *See* 20 U.S.C. §§ 1412(2)(c), 1414(a)(1)(A), 1415, 1417(b); 34 C.F.R. §§ 300.5(a), 300.500-534.

[12] This section provides in full:

> The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

U.S.C. §§ 1412(2)(C), 1414(a)(1)(A) (emphasis supplied). The regulations further emphasize this point, stating that "[t]he definition of 'special education' is a particularly important one . . . since *a child is not handicapped unless he or she needs special education.*" 34 C.F.R. § 300.14, Comment 1 (emphasis supplied). *See also* 34 C.F.R. § 300.5(a). Thus, by limiting children who are eligible for services under the EAHCA to those who "need" or "require" special education, Congress has defined "all handicapped children" to mean something less than the term might appear to suggest at first blush.[13] In particular, people who cannot benefit from such services plainly do not need or require them.[14]

Second, a proper understanding of what it is that the EAHCA guarantees to eligible individuals—*i.e.*, "a free *appropriate* public education"—also demonstrates that children who cannot benefit from educational services are not covered. This Court has previously held that "[i]mplicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer *some educational benefit* upon the handicapped child." *Board of Educ. v. Rowley, supra*, 458 U.S. at 200 (emphasis supplied). Although *Rowley*

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[13] By contrast, Congress has defined the term "handicapped individual" under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 706(7), significantly more broadly to include "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."

[14] The First Circuit also relied on the priority given under the EAHCA for "*handicapped children . . . with the most severe handicaps.*" Pet. App. 11a (emphasis in original) (quoting 20 U.S.C. § 1412(3)). But this provision does not eliminate the antecedent condition imposed by the definition of handicapped children—*i.e.*, that the child "require" special education in the first place. Only if a child meets that threshold does the priority for "severity of handicap" come into play.

established a minimum level of services that must be provided for an education to satisfy the EAHCA, its view of "appropriateness" remains fully applicable in the present circumstances; *i.e.*, an education is not appropriate if the child simply is incapable of benefiting from it. *See Parks v. Pavkovic*, 753 F.2d 1397, 1405 (7th Cir.), *cert. denied*, 473 U.S. 906 (1985) (this position is "implicit" in *Rowley*). Indeed, this "benefit" requirement is expressly reflected in the statute itself, which limits the provision of "related services" to those that will "assist a handicapped child to *benefit* from special education." *Board of Educ. v. Rowley, supra*, 458 U.S. at 201 (emphasis in original) (quoting 20 U.S.C. § 1401 (a)(17)). In short, here as in *Rowley*, "[i]t would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education." 458 U.S. at 200-01.[15]

Thus, contrary to the plain language interpretation relied on by the First Circuit, when the EAHCA is read as a whole, it becomes clear that children who are incapable of benefiting from special education do not come within its coverage. Moreover, to the extent that the court attempted to shore up its conclusion by relying on legisla-

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[15] *Rowley*'s requirement that the education provided to handicapped children must "be sufficient to confer some educational benefit" demonstrates just how unworkable the decision below is likely to be. Petitioner is now charged with the responsibility of providing services that will confer some educational benefit on a child who is incapable of being benefited. As each year's educational program shows this to be the case, it can be expected that greater and greater demands will be imposed on petitioner in what is destined to be a futile effort to meet its obligation under *Rowley*. The school district, in other words, will be left without any objective standard for determining the level of services that it must provide, an outcome which *Rowley* explicitly condemns. 458 U.S. at 190 n.11.

tive history, its effort was equally misguided.[16] In the first place, most of the materials it cites simply repeat the references to "all handicapped children" and to the priority for those with "the most severe handicaps." Pet. App. 18a-22a. As previously noted, however, these requirements are specifically limited by the definition of "handicapped children" that is contained in the statute itself. *See* pp. 11-12 *supra*. More significantly, at no point does the court cite any legislative history indicating that Congress expressly intended to require the States to provide educational services to children who cannot benefit from them.[17] In the absence of that kind of legislative

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[16] The court's reliance on administrative and judicial decisions is likewise unhelpful. Inexplicably, it cited only those administrative decisions that favored its position, even though they were clearly a "minority" view. *See* note 8 *supra*. Similarly, the court quoted supporting *dicta* from other courts while ignoring contrary *dicta*. *See, e.g., Matthews v. Campbell*, 3 EHLR 551:264 (E.D. Va. 1979). Indeed, in an attempt to distinguish a clearly inconsistent Seventh Circuit opinion, the court intentionally omitted a key factual predicate that renders its distinction untenable. Thus, it quotes the Seventh Circuit to the effect that an argument suggesting that "persons as severely retarded as [plaintiff] . . . are uneducable" would not be *"likely to succeed."* Pet. App. at 32a (emphasis in original) (quoting *Parks v. Pavkovic, supra*, 753 F.2d at 1406). But the Seventh Circuit made clear—in words immediately following those with which the court below ended its quote—that it was speaking of children who function at a mental level of *"3-6 years old."* 753 F.2d at 1406 (emphasis supplied). In this case, by contrast, we are dealing with a child who functions at the level of a newborn infant. App. II, 250-52, 382-85; App. IV, 891, 959. Timothy is thus in the very different situation discussed by the Seventh Circuit (but ignored by the court below): *i.e.*, "he could not benefit from special education no matter how expensive." 753 F.2d at 1405.

[17] The court attempts to suggest otherwise by quoting a Senate Report which states that "[t]he Committee recognizes that in many instances the process of providing special education and related services to handicapped children is *not guaranteed to produce any particular outcome*." Pet. App. 23a (emphasis in original) (quoting S. Rep. No. 168, 94th Cong. at 11 (1975)). But this quotation

clarity, there is no basis for imposing such a requirement on participating States. As this Court has previously explained, because the EAHCA was enacted pursuant to congressional spending powers, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Board of Educ. v. Rowley*, *supra*, 458 U.S. at 204-05 n.26 (quoting *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).[18]

In sum, the illogical result reached below—that Congress intended States to provide costly educational services to children who are unable to benefit from them—is simply not compelled by the language of the statute. Far from it, that language, read in its entirety, demon-

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has been wrenched completely out of context. It came about in response to concerns expressed during committee hearings that the EAHCA's requirement of an individualized educational plan would be perceived as creating an enforceable contract and thus make school districts potentially liable for non-performance. It was in this regard that the Committee made the statement quoted by the court of appeals, emphasizing that "[i]t is not the Committee's intention that the written statement developed at the individual planning conferences be construed as creating a contractual relationship." S. Rep. No. 168, 94th Cong. at 11 (1975). *See also* 34 C.F.R. § 300.349 and Comment thereto. The Senate Report had nothing to say about whether Congress intended the States to provide educational services to children who were shown to be incapable of learning.

[18] The Court elaborated on this basic point only last Term in an analogous area of federalism:

> Legislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment. If Congress' intention is "unmistakably clear" in the language of the statute, recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile . . .

Dellmuth v. Muth, 109 S. Ct. 2397, 2401 (1989). *See also Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989) (same requirement for a clear congressional statement in spending power cases as in Eleventh Amendment cases).

strates that Congress intended coverage only for those children who, regardless of their handicaps, stood to receive at least some benefit from special education.[19]

3. This case merits review for another reason as well. In addition to expanding the category of people who are covered by the EAHCA, the court of appeals also enlarged the scope of services that must be provided thereunder. Specifically, the court ruled that "education is broadly defined [under the statute]," and includes such services as "physical therapy" and "occupational therapy." Pet. App. 33a-34a.[20] This view of educational services is directly at odds with the statutory provision defining physical therapy and occupational therapy as "related services," which is a category that is separate and distinct from "special education." *See* 20 U.S.C. §§ 1401 (a)(17), (18). The distinction between these two categories is particularly significant, moreover, because coverage for special education under the EAHCA is much more comprehensive than is coverage for related services.

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[19] Even the First Circuit, perhaps without recognizing the fact, seemed unprepared to apply its inflexible interpretation of the EAHCA faithfully. Thus, it criticized the district court for having relied on *Parks v. Pavkovic*, *supra*, where the Seventh Circuit had discussed a child in a coma and indicated that he would not be covered under the EAHCA "since the child would be completely uneducable in his condition—since he could not benefit from special education no matter how expensive." 753 F.2d at 1405. Aside from noting that this discussion was *dictum*, the court below distinguished the case on the ground that plaintiff in the present case "is not in a coma, and does respond to stimuli and his environment." Pet. App. 32a. But the distinction would be irrelevant if the court truly meant to rule that all severely disabled children—regardless of whether they possibly could benefit from educational services—must receive them under the EAHCA. A child in a coma is certainly "handicapped" as that term was interpreted by the First Circuit.

[20] The court evidenced this aspect of its decision by citing to a variety of cases and inserting parentheticals indicating that particular types of services are to be considered "educational."

See Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984). The First Circuit's decision to eliminate this distinction, therefore, is likely to increase the burdens on state governments and local school districts by requiring them to provide additional non-educational services to numerous handicapped children.[21]

One of the most fundamental distinctions under the EAHCA is between the two components of a "free appropriate public education"—*i.e.*, "special education," on the one hand, and "related services," on the other. 20 U.S.C. § 1401(a)(18). Special education must be provided to all individuals who are covered by the EAHCA, which at this point is in excess of four million handicapped children. *See* U.S. Dep't of Education, Ninth Annual Report to Congress on the Implementation of the Education of the Handicapped Act 95 (1987). Once eligible for special education, moreover, a student is also entitled to receive "related services," which are "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and [diagnostic] medical and counseling services) . . ." 20 U.S.C. § 1401(a)(17). In contrast to special education, however, "related services" need be provided only "*as may be required to assist a handi-*

[21] The court's reason for reaching this issue—other than the fact that respondent needs the non-educational services that the court included within its definition of education—is not altogether clear from its opinion. At one point, it suggests that the district court took too narrow a view of educational services. Pet. App. 34a. While we believe that a fair reading of the district court's opinion demonstrates the contrary, if the court of appeals were correct that the lower court had used too narrow a definition of education in determining whether respondent was educable, that, of course, would have been a sufficient basis to reverse the ruling of the district court. The court of appeals never suggested, however, that its decision on the definition of education was an independent basis for reversal. If it had, as we show in text, it would have been incorrect on that ground as well.

capped child to benefit from special education." *Ibid.* (emphasis supplied).

This limitation on the services that are provided under the EAHCA has generated a significant amount of litigation. *See* cases cited at Pet. App. 33a-34a. *See also McNair v. Oak Hills Local School Dist.*, 872 F.2d 153 (6th Cir. 1984); *Doe v. Anrig*, 651 F. Supp. 424 (D. Mass. 1987); *Detsel v. Board of Educ.*, 637 F. Supp. 1022 (N.D.N.Y. 1986), *aff'd* 820 F.2d 587 (2d Cir.), *cert. denied*, 108 S.Ct. 495 (1987); *Seals v. Loftis*, 614 F. Supp. 302 (E.D. Tenn. 1985). Many of the children covered by the statute plainly need services like counseling, psychological therapy, physical therapy, speech therapy or occupational therapy. Families and advocates thus have an obvious incentive to attempt to bring these services within the scope of the EAHCA. The consequent pressure on school districts to cover the costs of all services needed by a handicapped child—either through a broad definition of "special education" or through a loose interpretation of when a service is "related"—has been enormous.

This Court has previously recognized the potential dimensions of this problem. In *Irving Indep. School Dist. v. Tatro*, *supra*, the Court found a catheterization procedure to be a "related service" because it was necessary to enable the child to remain on the school premises, which in turn allowed her to benefit from education. In so holding, however, the Court was careful to make clear that not all services needed by a handicapped person would properly be covered as "related services" under the Act. On the contrary, "[t]o keep in perspective the obligation to provide services that relate to both the health and educational needs for handicapped students," the Court emphasized that "only those services necessary to aid a handicapped child to benefit from special education must be provided, *regardless [of] how easily a school nurse or layperson could furnish them.* For example, if a

particular medication or treatment may appropriately be administered to a handicapped child *other than during the school day*, a school is not required to provide nursing services to administer it." 468 U.S. at 894 (emphasis supplied).

The decision in the instant case completely undoes the approach marked out in *Tatro*. By redefining "related services" to be a part of special education, the First Circuit has mandated that they be provided by local school districts to handicapped children in all circumstances, and not only when necessary to allow a child to remain in school. This holding is also plainly at odds with the terms of the statute since the services in question—"occupational therapy" and "physical therapy"—are expressly identified as "related services." 20 U.S.C. 1401(a)(17). Thus, even though the boundaries of what constitutes "special education" may not be precisely delineated in the EAHCA, it is clear that the services at issue in this case cannot properly be included within those boundaries.

This aspect of the court of appeals' decision is likely to have very important consequences. If followed, it will greatly increase burdens on local school districts by requiring that they provide and pay for virtually all services needed by millions of handicapped children. In view of the dimensions of those needs, the impact is likely to be very substantial indeed. Such a clearly incorrect reading of the statute, which threatens to have major financial consequences, should not be allowed to stand. This is especially true because, to all appearances, the court below was focused on a different issue and therefore was probably unaware of the potential effects of its redefinition of educational services under the EAHCA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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